Pay Pending Appeal

Report to the Legislature

as required by Chapter 280, Laws of 2008

November 2009

Washington State Department of
Labor & Industries

Introduction

This report is required in legislation passed by the 2008 Legislature. In Engrossed Second Substitute House Bill 3139 [Chapter 280, Laws of 2008 Section 5 (1)], the legislature directed the department to study appeals of workers' compensation cases and to collect information on the impacts of the act. It read:

> *The department shall study appeals of workers' compensation cases and collect information on the impacts of this act on state fund and self-insured workers and employers. The study shall consider the types of benefits that may be paid pending an appeal, and shall include, but not be limited to:*
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> *(a) The frequency and outcomes of appeals;*
> *(b) The duration of appeals and any procedural or process changes made by the Board to implement this act and expedite the process;*
> *(c) The number of and amount of overpayments resulting from decision of the Board or court; and*
> *(d) The processes used and efforts made to recoup overpayments and the results of those efforts.*

The legislation directed the department to report to the workers' compensation advisory committee (WCAC) and to the appropriate committees of the legislature by December 1, 2009, and annually thereafter, with the final report due by December 1, 2011. The legislation went on to require the WCAC to provide its recommendations for addressing overpayments resulting from the act, including the need for and ability to fund a permanent method to reimburse employer and state fund overpayment costs.

Brief Summary

ESSHB 3139 created a new section that states any order by the department awarding benefits shall become effective and benefits due on the date the order is issued. Upon appeal, such orders are not stayed pending a final decision on the merits unless ordered by the Board of Industrial Insurance Appeals (the Board), or unless the worker requests in writing that benefits cease pending the final decision.

Under the new provisions, employers may move for a stay of the order on appeal within fifteen days of the order granting appeal. The Board will review the claim file provided by the department as it existed on the date of the department order. The Board must

issue a final decision on the motion to stay benefits within twenty-five days of the filing of the motion or of the date of the order granting appeal, whichever is later. A motion to stay must be granted if the moving party can demonstrate they are more likely than not to prevail on the facts as they existed at the time the order was issued. The Board will not consider the likelihood of recoupment of any overpayments when making its decision.

The department must collect information on self-insured claim overpayments resulting from final decisions of the Board and the courts. These overpayments must be recouped by the department on behalf of self-insurers from any open, new, or reopened state fund or self-insured claims, if applicable.

For purposes of this act, payments made to health services providers whose treatment or services were authorized by the department or the self-insurer cannot be recouped from the health services provider.

If, after twenty-four months of recoupment efforts, a self-insured employer has not fully recovered an overpayment resulting from a decision of the Board or the courts, the self-insurer will be reimbursed the remainder of the amount due from the self-insured employer overpayment reimbursement fund which was created by the act. Moneys for this fund are retained from employees of self-insured employers. Self-insurers may also be reimbursed from this fund at any time if the director waives any overpayment that resulted from a decision of the Board or the courts.

Background

Pursuant to RCW 51.52.050, department orders do not become final until sixty days after affected parties receive them. Prior to the passage of this legislation, when orders were issued that provided or required the payment of benefits, self-insured employers or the department were not required to begin benefits until the order awarding them became final. An order does not become final if protested or appealed by any party until the litigation is resolved. For state fund claims, a worker could receive payments during an employer's appeal if the employer was considered unlikely to prevail by the department. For self-insured claims, employers did not generally pay benefits until the Board made its decision on the appeal.

As a result, a worker may not receive the ordered benefits until a decision on an appeal was made by the Board, or the courts. During lengthy appeal processes, workers could go months or even years without benefits. These cases prompted the passage of ESSHB 3139.

Provisions to ensure recoupment of resulting overpayments were included in the legislation to address concerns that overpayments resulting from payments made during an appeal could not be recovered.

The legislation affects all department orders granting benefits that were issued on or after June 12, 2008. Orders that do not grant benefits such as those rejecting a claim, segregating a condition, or assessing a penalty are not affected.

Implementation Efforts at the Board of Industrial Insurance Appeals

The following information has been provided by the Board for this report:

The Board developed and implemented procedures for conducting a review of the department file and issuance of an order in response to an employer's motion to stay benefits pending the appeal. When a motion is filed before the appeal has been granted, the Board includes language in its order granting appeal advising the parties that a motion for stay has been filed. Orders granting appeal also include a notice to workers advising them of their responsibility to repay an overpayment of benefits and their ability to request benefits be suspended during the appeal.

Once a motion is received and the appeal granted, the motion is assigned to one of the Board's review judges. Parties may respond to the motion, but the Board will not delay ruling on the motion in order to consider a response that is not immediately filed. The assigned judge, using access to the department's electronic record, reviews the record as it existed on the date of the order under appeal. Because of the size of the record, this review can be extremely time consuming. The judge prepares a recommendation and draft order consistent with their recommendation. The three Board members review the recommendation. An order is issued consistent with the outcome as determined by a majority of the members.

Implementation Efforts at the Department of Labor and Industries

Fund Assessment

The self-insured employer overpayment reimbursement fund (SIORF) was established as a non-interest bearing account. Funded by workers of self-insured employers, this account was created to reimburse self-insured employers for overpayments that result from overturned benefit orders when they are unable to collect from the worker. Effective January 1, 2009, self-insured employers were required to collect a new assessment from their workers and forward the monies to the department quarterly. The assessment rate for 2009 was $0.0004 per hour worked, or approximately $0.07 per worker per month. The balance of the fund as of October, 2009, was approximately $250,000. No funds have been withdrawn as of this date.

Automated Systems

Programming changes were made to modify existing payment processes. These included modification of the department's payment system for permanent partial disability (PPD) to comply with the automatic stay of any PPD award increase, and development of a system to track overpayments to withhold money from state fund claims to reimburse self-insurer overpayments.

Appeal Review Processes

Staff in the appeals section of the department developed a new process to identify and implement the highest undisputed wage or compensation rate upon appeal. Processes were also developed for handling granted stay motions and worker requests to cease benefits.

Overpayment Reimbursement

To date, the department has not received any requests to assess an overpayment to allow a self-insurer to ultimately utilize SIORF. One verbal inquiry was received, but the case did not qualify for reimbursement from the fund. The law permits reimbursement

two years after initial collection efforts, which cannot begin until the assessment is made.

Education

To assist the self-insured community with compliance, the department provided several educational opportunities regarding the new legislation:

- A continuing education course, “Update 2008”, covered basic requirements in mid-2008;
- We shared a question-and-answer document via the self-insurance listserv in June, 2008;
- In July, 2009, we developed a matrix clarifying what benefits, and when, a self-insured employer must pay after the department issues an order;
- A second continuing education course, “Update 2009”, discussed the legislation and resulting process changes.

Compliance

On a small number of cases, the department has been made aware that some self-insured employers have failed to pay benefits during the appeal period, or have waited to begin payment until after the Board has denied a motion to stay. We received one dispute/complaint from a worker, in July of 2009. In that case, the department ordered payment of time-loss compensation and the employer appealed the order. The Board granted a stay, but the employer had not paid benefits for the period between the department order and the date the stay motion was granted. In response to the dispute, the department ordered the employer to pay the worker a total of $13,432.79 in time-loss plus a penalty for delay of benefits of $3,358.20 (payable to the worker). The employer has appealed this penalty, arguing that under the law when a stay motion is granted no benefits are owing, even prior to the date of the stay motion.

The department has developed a notification letter that will be sent to the employer and the worker upon notice that the Board has granted an employer’s appeal to an order awarding benefits. This letter will inform all parties that benefits are due and payable during appeal.

Impacts on Appeals and Overpayments

At the Board of Industrial Insurance Appeals

Number of Appeals

The following statistics show a comparison of appeal activity for the year before implementation and the year after implementation. The data shows a modest increase in overall appeals. However, there was a decrease in the number of self-insured employer appeals and an increase in the number of state fund employer appeals. The number of appeals granted by the Board decreased for both self-insured and state fund appeals. Based on information currently available, the department is not able to determine whether the changes in appeal data are related to the legislation.

	FY 2008	FY 2009
Total Appeals Received	12,005	12,224
Self-Insured Appeals	2,578	2,533
State Fund Appeals	9,427	9,691
Total Appeals by Employer	1,744	1,945
Self-Insured Appeals	630	473
State Fund Appeals	1,114	1,472
Total Appeals Granted	7,252	6,944
Self-Insured Appeals	2,106	1,810
State Fund Appeals	5,146	5,134

Duration of Appeals

The following statistics show a comparison of the duration of appeals for the year before implementation and the year after implementation. The data shows a decrease in the average weeks to completion by over a week. The reduction in time is most notable in the procedural area of settlements and dismissals where the process has been shortened by nearly three full weeks.

	FY 2008	FY 2009
Average Weeks to Completion	34.1	32.8
Settlements and Dismissals	27.5	24.9
Self-Insured Appeals	29.3	27.6
State Fund Appeals	26.7	23.9
Contested Cases	55.6	55.9
Self-Insured Appeals	61.9	61.3
State Fund Appeals	52.4	53.7

Stay of Benefit Motions

The following data shows the number, and the outcome, of stay of benefit motions since the effective date of the legislation (June 12, 2008) as of October 27, 2009. Out of 164 employer motions to stay benefits, the Board has granted a stay of the department's order in eight cases, or approximately 5 percent. The worker requested that benefits cease in one case.

Number of Employer Stay of Benefit Motions: 164

- State Fund: 36 of 164 (22%)
- Self-Insurance: 128 of 164 (78%)

Number of Employer Stay Motions Granted: 8

- # Denied: 136
- # Dismissed: 1
- # Withdrawn: 1
- # Pending: 8
- # Reassumed: 10

Number of Worker Cease Benefit Requests: 1

At the Department of Labor and Industries

Pre-Appeal Activity:

Protests

As the legislation provides that benefits are due on the date an order is issued, the activity prior to an appeal of an order is also important. The effect of a protest to an order awarding benefits places the order on hold and benefits are not required to be paid until a further department order is issued. The department's instructions to employers that they commence benefits when the awarding order is issued, and stop until the department takes further action on a protest, was an area of controversy. A review of stakeholder testimony and written documents about the legislation did not reveal any discussion of protests or activity prior to the filing of an appeal to help guide the department's application of the new statute. Our policy decision was ultimately based on the statutory language, past case law, and consultations with our legal counsel.

The following data shows an increase in the total protests received. The data shows a modest increase in self-insurance, and more notable increase in state fund. This data includes protests by any affected party, including the worker.

	FY 2008	FY2009
Total Protests Received	32,968	35,528
Self-Insured Protests	5,345	5,406
State Fund Protests	27,623	30,122

Post-Appeal Outcomes:

Number of Overpayments

According to department records, since the legislation became effective there have been a total of 2,340 employer appeals as of October 27, 2009. Forty-five percent of these appeals remain unresolved, 25 percent were dismissed, and 17 percent were denied. The remaining 13 percent were either settled by the parties or a decision was

made by the Board. To date, the Board has not issued a decision reversing an order awarding benefits that creates an overpayment (in either a state fund or self-insured claim).

Next Report

The department's next report to the WCAC and the legislature is due December 1, 2010, with a final report due December 1, 2011.